

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE,ss

SUPERIOR COURT DEPARTMENT

Docket No. 1672 CV 00467

**CHRISTINA STEVENS, TRUSTEE OF
THE LIGHTHOUSE REALTY TRUST**

Plaintiff

v.

**TOWN OF BOURNE ZONING BOARD OF
APPEALS, ET AL and JAMES F.
MOLLOY**

Defendants

MEMORANDUM IN SUPPORT OF

DEFENDANT JAMES F. MOLLY'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's property is a former lighthouse and keeper's cottage located at the tip of Wings Neck in Bourne. Sixteen other houses, mostly seasonal use, have been constructed in the immediate neighborhood on lots formerly part of the lighthouse property. The roads are narrow and the house lots are small. Defendant James F. Molloy's house is across Lighthouse Lane from the Plaintiff's property at the intersection of Westview Street.

The decision of the Bourne Zoning Board of Appeals voted September 7, 2016 and filed with the Bourne Town Clerk on September 14, 2016 was appealed to this court by the Plaintiff. The ZBA decision clearly finds that plaintiff's property is located in a R-80 residential zoning district which prohibits commercial activities such as weddings, receptions and company functions as primary uses. Further, the decision finds that these activities are neither accessory or incidental to the allowed residential use when they are conducted by tenants or occupants who are short term and the function is the apparent primary or main reason for the rental.

"Any rental where the primary purpose is a wedding venue is a commercial use and not an accessory use and is thereby prohibited by the Bourn bylaws. Commercial recreation is specifically prohibited in an R-80 district. (see section 2220). Renting the premises for large functions that involve entertainment and alcohol certainly constitute 'commercial recreation.

When a premises is advertised as a wedding venue and rented for one week or less in order to hold a large wedding on the premises during that week, the primary use of the premises is for the wedding and residential purpose of the rental of the dwelling becomes the accessory or incidental use". See Decision of the Board of Appeals, page 7, attached hereto as Exhibit 1.

After a bench trial before the Honorable Kenneth J. Fishman, the decision of the Bourn Zoning Board of Appeals was upheld by judgment dated November 28, 2018 and entered on December 17, 2018. Notice of Appeal to the Appeals Court dated December 20, 2018 was filed by the Plaintiff. See Decision and Notice of Appeal are attached hereto as Exhibits 2 and 3 respectively.

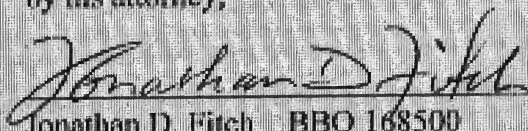
Weddings or other events, when conducted at the premises, have a dramatic, intrusive effect on Defendant Molloy and the other residents' peaceful enjoyment of the area often for as much as three days; one day for set-up, one day for the event and one day for tear-down. Tents and chairs, portable toilets and sound systems and catering equipment are all brought in by trucks and workmen. Noise and windblown debris are often carried by prevailing southwesterly winds from Plaintiff's property into neighbors yards. Defendant Molloy's house is downwind, across

Lighthouse Lane and is one of the closest neighbors to Plaintiff's property. These kinds of days where traffic, parking, amplified speakers and music, trash, workers, guests and all activities associated with a group of people celebrating an event intrude into the usual peacefulness of a residential neighborhood are lost to the Defendant and his neighbors forever. Summer days are few and precious. See Affidavit of James F. Molly submitted herewith.

Starting with an opinion of the Bourne Building Inspector dated January 15, 2013 followed by Decisions of the Bourne Zoning Board of Appeals and this court, Defendant's position that weddings, receptions and similar events at Plaintiff's residential property are unlawful has been upheld. For these reasons, there is a strong likelihood of success on the merits at the Appeals Court.

If the injunction is granted, the Plaintiff is personally unaffected. She can still rent her wonderful lighthouse as an extraordinary location for a summer or anytime vacation. If it is determined by judgment that issuance of the injunction is wrong, her damages can be measured and compensated. The loss of even one peaceful summer's day can never be recovered.

Respectfully submitted,
James F. Molly, Defendant
by his attorney,


Jonathan D. Fitch BBO 168500

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774-313-6985
macfitchjdf@aol.com

EXHIBIT 1

RECEIVED



TOWN OF BOURNE
BOARD OF APPEALS
24 PERRY AVENUE
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TOWN CLERK BOURNE
02532
EXT. 21

APPEAL OF THE DECISION OF THE BUILDING INSPECTOR FINAL DECISION

PETITION NUMBER: 2016-A17
NAME OF APPLICANT: JAMES F. MOLLOY
PROPERTY ADDRESS: 0&1 LIGHTHOUSE LANE, POCASSET, MA
REGISTRY OF DEEDS TITLE REFERENCE: BOOK #17933, PAGE #320
TOWN MAP: #45 PARCELS: #14 & #20

On September 7, 2016, the Board of Appeals voted to grant the above entitled appeal of the decision of the Building Inspector, overturning the enforcement order dated June 23, 2016, and substituting therefor the cease and desist order dated January 15, 2013, in accordance with Massachusetts General Laws Chapter 40A, Section 8, and Section 1320 of the Bourne Zoning Bylaws, for the property located at 0 & 1 Lighthouse Lane, as shown on assessor's map #45, parcels #14 & #20, in an R-80 zoning district.

The Board of Appeals certifies that the decision attached hereto is a true and correct copy of its decision to grant the appeal of the decision of the Building Inspector dated June 23, 2016, and that a copy of said decision, and all plans referred to in the decision, have been filed with the Town Clerk.

Any person aggrieved by this decision may appeal to the Superior Court or Land Court as provided in M.G.L. Chapter 40A, Section 17, and by filing a NOTICE OF ACTION AND COMPLAINT with the Town Clerk within twenty (20) days of the date of filing of this decision.

Lee M. Berger, Chairman
Board of Appeals

DECISION

Facts of the Case

The subject property is located at the water's edge of a peninsula known as Wings Neck, and is surrounded by approximately 14 residential homes, all located in an R-80 zoning district. While new homes in an R-80 zoning district require 80,000 square foot lots, all of the lots in this area, including the locus, are significantly smaller, grandfathered lots.

The Owner of 0 & 1 Lighthouse Lane, Christine Stevens, Trustee of Lighthouse Realty Trust (hereinafter the "Owner"), rents the subject property on a short term basis (weekly or less) and advertises on the internet that the property is available as a venue for weddings and other functions. Numerous weddings and wedding receptions have been conducted over the past years at the property. These functions have caused substantial disruption to the quiet enjoyment of the abutters and other residences along the road leading to the water's edge as a result of traffic, noise, garbage and trespass.

On January 15, 2013, the Building Inspector sent a letter to the Owner stating, in relevant part, that "it is a VIOLATION of the Zoning Bylaws to use that property for weddings and or wedding receptions. This letter will constitute both a warning to you and my decision as Zoning Enforcement Officer. Please be advised that this decision may be appealed to the Zoning Board of Appeals pursuant to Chapter 40A M.G.L."

The Owner did not appeal, but rather ignored the letter and continued to rent the premises for large weddings and wedding receptions. In response to her continued refusal to comply with the letter, the Selectmen of the Town of Bourne (hereinafter the Selectmen") filed a Declaratory Judgment action in the Land Court. Abutters attempted to intervene in the Land Court case, but their motion was denied. On June 2, 2016, the Selectmen entered into an "Agreement" with the Owner of the locus, which became the Land Court Judgment. Said Agreement contained the following conditions: the Owner was allowed to hold no more than four (4) functions per year, with one function per

month occurring in the months of May, June, September, and October of each year; said functions would be limited to 100 or fewer guests; the Owner was required to clean the area after each function; entertainment, such as music, was required to be shut down after 10 p.m.; all function guests were prohibited from using the private beach; a detailed police officer was required for any function that exceeds fifty (50) guests; and other restrictions not herein relevant.

The Agreement specifically states that the Agreement "does not preclude the Town from prospectively enforcing its Zoning By-Laws in accordance with its provisions." It also states "Bourne agrees to dismiss the Massachusetts Land Court Civil Action No. MISC 000232, with prejudice." It also states "Bourne agrees to vacate the current Cease and Desist Order on the Property and to substitute in its place a Cease and Desist Order that reflects the terms of this Agreement." It also states "The parties hereto understand and acknowledge that this Agreement contains the entire agreement between the parties hereto, and the terms of this Agreement are contractual and not a mere recital. Further this agreement is deemed to be made in the Commonwealth of Massachusetts and it and the legal relations between the parties hereto shall be governed and construed according to the Laws of the Commonwealth of Massachusetts."

After the Agreement was signed by the Selectmen and the Owner of the locus, the Building Inspector sent a letter to the Owner of the locus dated June 23, 2016, stating in relevant part: "Pursuant to an Agreement entered on June 2, 2016, by and between the Town of Bourne and Christine Stevens, Trustee of 'The Lighthouse Realty Trust' and approved by the Massachusetts Land Court, I, Roger Laporte, Zoning Enforcement Officer, hereby vacate the current CEASE and DESIST order, and substitute in its place this ORDER that reflects the term of the Agreement." The rest of the June 23, 2016, letter restates the terms of the Agreement. The end of that letter states "This decision may be appealed pursuant to Chapter 40A M.G.L."

On July 8, 2016, James F. Molloy, an abutter to the locus, appealed the decision of the Building Inspector dated June 23, 2016. At the hearing before the Board of Appeals, numerous other abutters came to support Mr. Molloy, and at least four (4) other abutters testified. Neither the Owner of the locus nor any representative on her behalf was present. Also, none of the Selectmen nor anyone on their behalf was present.

Discussion

The primary question before the Board of Appeals is whether renting premises in a residential zone for large wedding functions is an "accessory use" permitted by the Bourne Zoning Bylaws.

"By statute, '[t]he responsibility for enforcing zoning ordinances or by-laws lies with the municipality and is assigned by statute to the building inspector or other specified municipal officers. *McDonald's Corp. v. Seekonk*, 12 Mass. App. 351, 353 (1981). Under Bourne's Zoning Bylaw, Section 1210, the Building Inspector is the "Chief Zoning Enforcement Officer" in the Town of Bourne. Once the Building Inspector makes a decision, any aggrieved party has the right to appeal said decision to the Board of Appeals within thirty (30) days of the decision, in accordance with MGL chapter 40A, section 8.

Commercial uses, including commercial recreation, are specifically prohibited in an R-80 zoning district. Property in an R-80 zoning district is limited to residential use, or accessory uses, some of which are listed in the Town of Bourne bylaws (such as home occupations or by special permit accessory dwellings which serve significant community purposes such as caring for the elderly or providing affordable housing, and a roadside stand for sale of produce largely raised on the premises). "Other customary accessory uses" are also permitted in an R-80 zoning district. (See Section 2220 of the bylaws). "Accessory uses" are defined in the definition section of the bylaws as follows: "a use customarily incidental to, and on the same lot as, a principal use and occupying less than 30% of the habitable floor area on the premises and less than 50% of the lot area."

The enumeration of uses allowed in a residential district is sufficient to prohibit other uses. *Town of Brookline v. Co-Ray Realty Company, Inc.*, 326 Mass. 206, 212 (1950), and cases cited therein. Indeed, "It is a familiar principle of interpretation that express mention of one matter excludes by implication other similar matters not mentioned." *Foster v. Mayor of Beverly*, 515 Mass. 567, 569 (1944).

For example, in *Town of Brookline v. Co-Ray Realty Company, Inc.*, *supra*, it was held that land in a single residential district could not be used as a rear yard for an apartment house.

Another example, in *Building Inspector of Chelmsford v. Belleville*, 342 Mass. 216, 217-218 (1961), it was held that "[t]he enumeration of permitted uses in a Single Residence A-1 District which does not include the storing or garaging of heavy equipment suffices to show that such use is not authorized in a Single Residence A-1 District in Chelmsford."

Another example, in *Richardson v. Zoning Board of Appeals of Framingham*, 351 Mass. 375, 380 (1966), it was held that a private access road in a single residential district was not permitted to serve an apartment house parking lot.

Another example, in *Harrison v. Building Inspector of Braintree*, 350 Mass. 559, 561 (1966), it was held that the use of land in a residential district for access roadways for an adjacent industrial plant violates the residential requirement.

Thus, both by expressly prohibiting commercial activity, and by expressly allowing residential activity, the Town of Bourne Bylaws prohibits, as of right, any auxiliary commercial enterprises in a residential district that are not specifically stated to be allowed.

As stated above, the primary question before the Board is whether renting premises in a residential zone for large wedding functions is an "accessory use" permitted by the Bourne Zoning Bylaws.

The basis of the Building Inspector's January 15, 2013 decision that holding commercial weddings in a residential zone was not an accessory use was the case of *DiGiovanni v. Town of Truro Board of Appeals*, Barnstable Land Court MISC 08-380468 (2012).

An accessory use is a use incidental to the primary use of the property. An accessory use is subordinate to the primary use, and is said to be attendant or concomitant. *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 844-45 (1994). Generally, an accessory use must be both incidental and customary. *Simmons v. Zoning Board of Appeals of Newburyport*, 60 Mass. App. Ct. 5, 8 (2003). Determining whether the use is incidental is a fact-dependent inquiry that looks to the effect of the incidental use on the primary use and the reasonableness of the relationship between the incidental and primary uses. *Henry*, 418 Mass. At 844. See also *Gallagher v. Board of Appeals of Acton*, 44 Mass. App. Ct. 906 (1997) (discussing case law surrounding the terms accessory and incidental use). Whether Plaintiffs use of this property is an accessory use also depends in part on the frequency and intensity of the challenged use. For a use to remain accessory it must be subordinate and minor in significance and at a certain point, the frequency of the use transforms an accessory use into a primary use. *Garabedian v. Westland*, 36 Mass. 432, 438 (1971). Activity of a certain magnitude is no longer incidental. *Garabedian* 59 Mass. App. Ct. at 436. See also *Henry*, 418 Mass. 841 (1994) (holding the use was not accessory based on the volume of earth removed, the duration of the project, and the scope of the project).

While a local zoning law may grant great indulgence to a use by expressly conferring upon it status as accessory, when the local bylaw does not specify what types of accessory uses are permitted, courts general look to what uses are customary. *Simmons v. Zoning Board of Appeals of Newburyport*, 60 Mass. App. Ct. 5, 8 (2003). In considering what is customary, factors include (1) the size of the lot; (2) the nature of the primary use; (3)) the use of the surrounding properties; and (4) the economic structure of the surrounding area. *Simmons*, 60 Mass. App. Ct. at 9 (quoting *Lawrence v. Zoning Board of Appeals of North Branford*, 158 Conn. 509, 512-513 (1969)).

DiGiovanni v. Town of Truro Board of Appeals, Barnstable Land Court MISC 08-380468 (2012).

While the *DiGiovanni* case held that more than 5 wedding per year constituted a commercial use and not an accessory use under the Truro bylaws, the Bourne Board of Appeals finds that any rental where the primary purpose is a wedding venue is a commercial use and not an accessory use and is thereby prohibited by the Bourne bylaws.

Commercial recreation is specifically prohibited in an R-80 district. (See section 2220.) Renting the premises for large functions that involve entertainment and alcohol certainly constitute "commercial recreation."

When premises are advertised as a wedding venue and rented for one week or less in order to hold a large wedding on the premises during that week, the primary use of the premises is for the wedding, and the residential purpose of the rental of the dwelling becomes the accessory or incidental use.

The effect of this decision on the Agreement and the Judgment of the Land Court is another question, and one the Board of Appeals cannot decide, but chooses to comment upon. MGL chapter 40A, section 5, provides for the manner in which zoning bylaws are established. The manner in which the Selectmen agreed to a change of use for the locus is not set forth in section 5; and since no public hearing was held by the Planning Board as required by section 5, and no action was taken by Town Meeting as required by section 5, the action of the Selectmen was ineffective to change zoning.

Only Town Meeting can change or add a use allowed in a residential district. Neither the Selectmen nor the Board of Appeals can grant use variances. (See section 1320 of the bylaws.)

Indeed, such a change in zoning affecting only this particular locus would be considered spot zoning, in violation of State law, even if the change had been voted at Town Meeting. "Spot zoning occurs when there is a 'singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot.'" *Whittemore v. Building Inspector of Falmouth*, 313 Mass. 248, 249 (1943). See *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 361-362 (1973). Such zoning 'constitutes a denial of equal protection under the law guaranteed by the State and Federal

Constitutions," *Id.* at 362 n. 15, and violates the 'uniformity' requirement of c. 40A, s. 4.... See also Bobrowski, Massachusetts Land Use and Planning Law s. 3.4.3 (1993)."
Rando v. Town of North Attleboro, 44 Mass. App. Ct. 603, 606 (1998).

While the Agreement does not prevent the Town from enforcing its bylaws, the Agreement also states that "the terms of this Agreement are contractual and not a mere recital." Whether this enforcement power and the contractual obligations are in conflict is unclear. What is clear, however, is that the abutters did not have an opportunity to intervene in the Land Court action and the abutters were not parties to the Agreement. Thus, the abutters have rights as aggrieved parties under MGL chapter 40A, section 8, and they have timely appealed the most recent decision of the Building Inspector to the Board of Appeals. The Board of Appeals has by this decision affirmed the rights of the abutters to the quiet enjoyment of their premises and the protections to which they are entitled in a residential district.

The Motion and The Vote

After hearing and due deliberation: On motion made by John O'Brien and seconded by Harold Kalick, it was voted to grant the appeal and overturn the decision of the Building Inspector dated June 23, 2016, and to substitute the Cease and Desist Order of January 15, 2013, for the property located at 0 & 1 Lighthouse Lane.

Voting in Favor of the Motion: John O'Brien, Wade Keene, Harold Kalick,
Tim Sawyer, and Lee Berger

Voting against the Motion: no one

Associate Members present but not voting: Kat Brennan and Amy Kullar

Respectfully submitted,

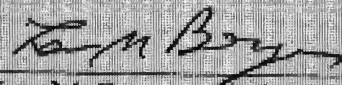

Lee M. Berger, Chairman
Board of Appeals

EXHIBIT. 2

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-467

CHRISTINA STEVENS, Trustee of the
LIGHTHOUSE REALTY TRUST,
Plaintiff

vs.

TOWN OF BOURNE ZONING BOARD OF APPEALS, et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF JUDGMENT

The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust, brings this action, seeking to annul the September 14, 2016 decision of the Town of Bourne's Zoning Board of Appeals, ordering her to cease and desist permitting renters of her property from conducting weddings and other functions on her property. On August 22, 2018, a jury waived trial was conducted before this Court. The last of the post-trial briefs was filed on September 14, 2018.

FINDINGS OF FACT

1. The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust ("LRT"), is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck, in Bourne, Massachusetts. 0 Lighthouse Lane consists of vacant land, and 1 Lighthouse Lane contains a three-bedroom dwelling with an attached light tower. The property is located in the R-80 residential district in Bourne, which allows for use as a single family dwelling, along with

customary accessory uses.

2. The defendant, James F. Molloy, is the Trustee of 2 Westview Street Realty Trust, which owns 2 Westview Street in Bourne. He seasonally resides with his family at that address.

3. That property consists of single-family residence situated on 11,573 sq. ft. in the same residential zoning district as the plaintiff's property.

4. Both Molloy's property and the LRT property are located within a private residential community, known as "Lighthouse Point."

5. The plaintiff does not reside at either house at 1 Lighthouse Lane. She advertises her property for rent, and although she does not expressly advertise it for wedding purposes, her website contains frequently answered questions which indicate that functions are permitted under certain circumstances.

6. Third parties who have rented the LRT property have held events, including weddings on the premises. According to one of the neighbors, since 2005 there have been 21 weddings and three other events such as clambakes. At least one neighbor has also held a wedding reception, and other events, including an annual Fourth of July party at the Molloy home.

7. There are 13 houses with 10 families on the Neck. The weddings have resulted in increased traffic, parking congestion, trucks delivering food, music and noise.

8. The plaintiff does not accept additional payment from renters who choose to hold events on the property, and she in no manner involved the planning, preparing or hosting of such events.

9. By certified letter, dated January 15, 2013, the Town of Bourne zoning enforcement

officer, Roger Laporte, informed Stevens that the use and marketing of the Lighthouse property for weddings constituted a commercial use, which was unlawful under the Town's zoning bylaws, and to cease and desist all such use.

10. On or about June 25, 2015, the Town of Bourne, commenced an action through Mr. Laporte against LRT in the Massachusetts Land Court, Docket #15MISC0002323(HPS) requesting that the Court issue: (a) a declaratory judgment declaring that LRT is prohibited by the Bourne Zoning Bylaw from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; (b) a temporary restraining order prohibiting LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; and (c) a preliminary injunction enjoining LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises, including wedding receptions.

11. Following Case Management Conference held on August 27, 2015, the Land Court issued an order referring the Land Court action to dispute resolution screening.

12. On November 20, 2015, the parties to the Land Court action, along with several owners of neighboring properties, attended a mediation to resolve their dispute short of a protracted litigation. All in attendance offered their opinions. Following the mediation, the parties to the Land Court action continued settlement negotiations. Stevens, through counsel, submitted a proposed agreement for the resolution of this action. She anticipated that there would be a counterproposal from the neighbors, but none was filed.

13. Molloy moved to intervene in the lawsuit between the Town and Stevens, but said motion was denied by Land Court on April 13, 2016. The Land Court judge, at the time of

denying Molloy's request to intervene, noted that "if settlement is reached, as the parties indicate is likely to occur, allowing the continued use of the property in the manner for which zoning enforcement was sought, Mr. Malloy's interest may not be adequately represented by the Town of Bourne. In such case, Court directed plaintiff to direct the Building Inspector, with respect to any decision vacating, annulling or otherwise modifying the cease and desist order, to provide notice of same to Mr. Molloy, as well as any other direct abutters to Defendant [Stevens'] property."

14. At a Selectmen's meeting on or about May 27, 2016, the Selectmen voted to accept Stevens's proposal, and on June 2, 2016, a formal agreement was entered into between Stevens and the Town of Bourne, in full settlement of the dispute. This agreement was approved and signed by the Board of Selectmen after public hearing.

15. Pursuant to this agreement, the parties agreed to the following:

(a) a "function" shall be an event in excess of twenty-five (25) guests hosted by renter of the premises; a "renter" shall be an individual or individuals occupying the Property pursuant to a written rental agreement.

(b) LRT agrees to limit the number of the functions on the property to four (4) functions per year: one per month for the months of May, June, September, and October to limit the number of guests to one hundred (100).

© LRT agrees to require any renter of the property who holds a function to clean the area following the function; should any renter fail to do so, LRT will ensure the premises is free from debris after a function.

(d) LRT agrees to discuss with any renters prior to a function to establish the property

lines to which the guests are to remain during functions;

(e) LRT agrees to require entertainment at renters' functions to be shut down at 10 p.m.;

(f) LRT agrees to require that guests of any function be prohibited from using the beach; however, any renter shall be permitted to use the beach on any day during his/her rental period;

(g) LRT agrees to require a detail officer for any function that exceeds fifty (50) guests and further agrees to instruct the hired detail police officer as to the parameters that the guests are allowed to visit during the function, where cars are to be parked, and also to make clear that the beach is off limits for guests during functions.

(h) LRT agrees to notify the Town Administrator in writing 30 days in advance of any function which will exceed fifty (50) guests.

(i) the Town of Bourne agrees to dismiss the Massachusetts Land Court civil action with prejudice; and

(j) the Town of Bourne agrees to vacate the current (January 15, 2013) Cease and Desist Order on the property and to substitute in its place a cease and desist order that reflects terms of this agreement.

16. As a result of the agreement, on or about June 8, 2016, the parties filed a stipulation of dismissal dismissing the Land Court action with prejudice, without costs and with all rights of appeal waived. The plaintiff thought that this dispute was over as a result of this decision. Indeed, on June 23, 2016, in a letter signed by Mr. Laporte, the Town incorporated the terms of the agreement into a new cease and desist order replacing the prior order, and notified Molloy of his right of appeal under G.L. c. 40A.

17. On July 8, 2016, Molloy filed an appeal of the revised cease and desist order, pursuant to § 8 of Chapter 40A.

18. Stevens did not appear at the public hearing on this appeal on September 7, 2016, before the Town of Bourne Board of Appeals, believing that this matter had been resolved. In the interim, she had four weddings taking place at her property since the decision. The police were detailed once, but denied requests on several other occasions for details.

19. Following the public hearing, the Town Board of Appeals, on September 14, 2016, voted to grant Molloy's appeal, and overturned the 2016 enforcement order, substituting it with the 2013 enforcement order. It does not appear from the Board's decision that any new facts or information was before the Board than those that were raised and considered by the parties to the Land Court action (other than the settlement agreement), and presented during the mediation at which Stevens' neighbors appeared and participated.

20. Stevens had not appealed the issuance of the cease and desist order issued in 2013 to the Bourne Board of Appeals.

21. On or about October 4, 2016, LRT filed its complaint in this action, appealing the Board of Appeals September 14, 2016 decision. To date, the building inspector has not issued a new enforcement order.

22. Stevens continued to permit weddings to be conducted on the property after the issuance of the 2016 cease and desist order.

CONCLUSIONS OF LAW

The plaintiff argues that the defendant Molloy, as a citizen of the Town, and the Town

itself, was barred from any further action after the entry of a stipulation of dismissal in the Land Court and the resultant entry of a new cease and desist order, based on principles of *res judicata*. "The doctrine of [*res judicata* or] claims preclusion makes a valid final judgment conclusive on the parties and their privies and bars all further matters that were or should have been adjudicated in the action." *Heacock v. Heacock*, 402 Mass. 21, 23 (1988). This doctrine has three elements: (1) a prior final judgment on the merits; (2) sufficient identity of the causes of action; and (3) identity or privity of the parties. See *Acclavatti v. Professional Serv. Group, Inc.*, 982 F. Supp. 69, 80 (D. Mass. 1997). A stipulation of dismissal with prejudice as occurred in this case, constitutes "an adjudication on the merits as fully and completely as if the order had been entered after trial" for purposes of *res judicata* and collateral estoppel. *Gaffe v. Sullivan*, 1996 WL1186788 *2 (Mass. Super. Ct. Mar. 21, 1996), citing *Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. Ct. 153, 157-158 n.8 (1979).

Relying on *Morganelli v. Building Inspector of Canton*, 7 Mass. App. Ct. 475 (1979), the plaintiff argues that Molloy's interests were fully represented in the Land Court action, and, therefore, he was barred from further relief in the Zoning Board of Appeals. *Morganelli* applied the doctrine, sometimes referred to as the "doctrine of virtual representation," see *Matter of Liquidation of American Mut. Liability Ins. Co.*, 417 Mass. 724, 735 n.8 (1994), that a private individual whose interest in the enforcement of zoning laws has been represented in previous litigation by a public agency or official and who does not have rights specifically granted by the statute is thereafter barred from instituting his own litigation. In *Morganelli*, however, the Court noted that the plaintiffs had "no direct private right at all." 7 Mass. App. Ct. at 485. The Court further recognized that the *Morganelli* plaintiffs were not pursuing their limited statutory rights

under c. 40A, § 17. *Id.* at 485 n.16. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 18 Mass. App. Ct. 632, 635-636 & n.5 (1984).

In this case, once the new cease and desist order entered in 2016 after settlement and dismissal of the Land Court action, the defendant Molloy exercised his statutory rights under Chapter 40A, and, appealed the new order entered into as a result of the settlement. Therefore, he was not barred from that action by doctrine of claim preclusion. Indeed, the right of Molloy to pursue this appeal was explicitly recognized by the Land Court at the time it denied Molloy's motion to intervene.

This Court is concerned about the conflicting decisions in this case, and the apparent unenforceability of a Land Court decision and the contractual obligations incurred by the Town by virtue of the settlement agreement. Even the Board of Appeals in its September 2016 decision acknowledged the potential conflict. But, as the Board noted, the abutters had rights as aggrieved parties under c. 40A, who had been denied the opportunity to intervene in, and be bound by the Land Court action. See *Barkan v. Brown*, 2017 WL 5706108 (Mass. Land Court Nov. 27, 2017).

This Court further finds that Zoning Board of Appeals ultimate determination that the plaintiff's use of the property is not an accessory use allowed within the residential district is not an arbitrary and capricious decision. While no one contests that the rental of these properties is permitted, and that at least one wedding has occurred on another property, as well as annual parties at a different home, this Court cannot substitute its judgment for that of the Board of Appeals. *Caruso v. Pastan*, 1 Mass. App. Ct. 28 (1973). Although at least one other wedding had taken place in the neighborhood and annual gatherings also occurred, accessory use could have been determined not to be customary or incidental to the residential use. See *Bourne*

Zoning By-law Section 2220 and Section V definitions. Accordingly, there is no basis upon which to find that the decision of the Zoning Board of Appeals must be annulled.

ORDER OF JUDGMENT

Based on the foregoing, it is hereby **ORDERED** that judgment shall enter for the defendant and against the plaintiff.


Kenneth J. Fishman
Justice of the Superior Court

DATED: November 28, 2018.

A true copy, Attest:

9

Emily W. Higgins
Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1672CV00467

CHRISTINA STEVENS, TRUSTEE OF
THE LIGHTHOUSE REALTY TRUST,
Plaintiff

Vs.

TOWN OF BOURNE ZONING BOARD
OF APPEALS, ET AL
Defendants

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NOTICE OF APPEAL

Now comes the Plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust
and gives notice of her intent to appeal the Judgment of this Court entered on December 17,
2018.

Respectfully submitted,
For the Plaintiff, Christina Stevens,
Trustee of the Lighthouse Realty Trust,
By her attorneys,

WYNN & WYNN, P.C.



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Dated: December 20, 2018